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No. 86-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KENNETH S. CAMERON,

Petitioner,

v.

MATTHEW FOGARTY and JOHN HALBIG,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. At common law, a plaintiff's conviction of the crime he or she was arrested for constituted a complete defense to an action for false arrest.

Should the defense be excluded from a false arrest action brought under 42 U.S.C. §1983 when the defense is consistent with the deterrent and compensatory purposes of the Civil Rights Act?

2. Whether the respondent police officers had a legally sufficient basis to detain petitioner until they could check his car's registration?

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

Petitioner, Kenneth Cameron, was stopped by the respondents, two New York City police officers, while driving in New York City in a car with Illinois license plates

and a broken window (3a).[1] The officers stopped petitioner because he made an illegal right turn and parked illegally at a bus stop and because the broken window suggested the car had been stolen (3a).

When asked for identification, petitioner produced a Virginia driver's license in the name Sammy Davis Jr. and a carbon copy of a Hertz rental agreement made out to Jenne Currie with the name Sammy Davis, Jr. added in handwritten ink as an additional driver (4a). The rental agreement provided that the car would be returned in Chicago ten days earlier (4a).

The officers radioed in to see if the car had been reported stolen but received no response (4a). Because they remained

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[1]Parenthetical references are to the petitioner's appendix.

suspicious, they went to the stationhouse with Cameron to investigate further (4a).

After calling Hertz, the officers learned that the car had been reported stolen (4a). Petitioner was then placed under arrest and charged with, inter alia, criminal possession of stolen property (5a). After a four day jury trial, petitioner was convicted of first degree possession of stolen property (7a). The conviction was affirmed on appeal (7a).

Petitioner then filed a complaint under 42 U.S.C. §1983 alleging that he had been arrested without probable cause (7a). The District Court granted respondents summary judgment and the Court of Appeals for the Second Circuit affirmed (3a, 26a).

1. The District Court Opinion

The District Court relied on two theories in granting respondents summary judgment. First, the Court reasoned that because of the similarity between a common law false arrest action and a section 1983 action alleging an arrest without probable cause, the common law defense of a subsequent conviction on the charge ("conviction bar") should apply to the section 1983 action (25a):

> Given the similarities in the state and federal claims here, logic would dictate that plaintiff's state conviction would also bar a federal claim asserting the absence of probable cause to arrest.

The Court also reasoned that petitioner's claim was precluded under 28 U.S.C. §1738 because under New York law, petitioner's conviction "necessarily includes a finding that there was probable cause to arrest...." (26a).

2. The Second Circuit Opinion

The Court of Appeals unanimously held that the common law conviction bar applies to a section 1983 action alleging arrest without probable cause. In so holding, the Court followed the long line of cases that have held that in enacting section 1983, Congress "likely intended" common law defenses to apply. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981). See, e.g., Monroe v. Pape, 365 U.S. 167, 187 (1961); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). (14a-15a, 17a-18a).

Relying on Owen v. City of Independence, 445 U.S. 622, 638 (1980), the Court decided that the defense "was well established at common law at the time 1983 was enacted" and that "its rationale was compatible with the purpose of the Civil Rights Act...." (14a-15a).

Application of the defense to section 1983 is, the Court found, appropriate under both the deterrent and compensatory purposes of the Civil Rights Act (18a). Analyzing the arrest as "premature", the Court found that any injury is "insubstantial" (18a). Moreover, the exclusionary rule both "minimizes the injury" caused by a premature arrest and deters such arrests (19a). The Court concluded (19a):

> [T]he proper accommodation between the individual's interest in preventing unwarranted intrusions into his liberty and society's interest in encouraging the apprehension of criminals requires that §1983 doctrine be deemed, in the absence of any indication that Congress intended otherwise, to incorporate the common-law principle that, where law enforcement officers have made an arrest, the resulting conviction is a defense to a §1983 action asserting that the arrest was made without probable cause.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT'S DECISION FOLLOWED THE APPLICABLE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE HOLDINGS OF ANY OTHER CIRCUIT.

The decision below properly followed the "well established" approach adopted by this Court to resolve whether a defense is available under 42 U.S.C. §1983. Malley v. Briggs, ___U.S.___, 106 S. Ct. 1092, 1095 (1986):

> Our initial inquiry is whether an official claiming immunity under §1983 can point to a common-law counterpart to the privilege he asserts. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether §1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. (quotations and citations omitted)

Id. See also Tower v. Glover, 467 U.S. 914, 920-21 (1984) and cases cited in the opinion below at 14a-15a.

When the Civil Rights Act was adopted the common law provided, as it provides today, that a conviction of the crime the plaintiff was arrested for is a complete bar to a subsequent civil suit for false arrest. See, e.g., Holley v. Mix, 3 Wend. 350, 353, 20 Am. Dec. 702 (N.Y. 1829); Restatement (Second) of Torts §§119(a), 121(a); Harper & James, The Law of Torts §3.18, at 372-74 (1986). Petitioner's argument that California no longer follows the rule (Pet. at 5), is irrelevant to the fact that the rule existed in 1871 when the Civil Rights Act was enacted. See City of Newport v. Fact Concerts, 453 U.S. 247, 258 (1981).

Because the conviction bar was recognized at common law, the remaining question is whether allowing the defense undermines the Civil Rights Act's purposes of deterrence and compensation. See, e.g., Malley v. Briggs, supra, 106 S. Ct. at 1095;

Owen v. City of Independence, 445 U.S. 622, 651 (1980). As the Court below properly found, the defense is consistent with the purposes of section 1983.

Deterrence is of minimal importance here because, as the Court below stated, the exclusionary rule already operates as a substantial deterrent (19a): "[O]fficers seek to avoid making flawed arrests in order to avoid the exclusion of evidence that could lead to conviction." Petitioner's argument that the exclusionary rule has no effect when no evidence or statements are taken (Pet. at 6), ignores reality. Because arresting officers can not know whether a stop will lead to statements or evidence, the exclusionary rule always deters improper arrests.

The compensatory purpose behind section 1983 does not require abandonment of the conviction bar. As the Court below

found, "the injury caused solely by prematurity of arrest is, of itself, insubstantial" (18a). A "real injury" would be caused only if incriminating evidence were gathered during the arrest (19a). Because that injury is already prevented by operation of the exclusionary rule, it is not necessary to recognize a new civil rights action in order to compensate the plaintiff who is arrested prematurely. Moreover, the near identity of the common law and section 1983 causes of action counsels in favor of adopting the common law judgment that there is no need for compensation. See Pierson v. Ray, 386 U.S. 547 (1967); McClam v. Barry, 697 F.2d 366, 370-71 (D.C. Cir. 1983), overruled on other grounds, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), cert. denied sub nom District of Columbia v. Brown, 471 U.S. 1073 (1985); Raysor v. Port Authority of

New York and New Jersey, 768 F.2d 34, 40 (2d Cir. 1985), cert denied, ___U.S.___, 106 S. Ct. 1227 (1986).

In Haring v. Prosise, 462 U.S. 306 (1983), this Court held that a plaintiff who pleaded guilty could bring a claim under section 1983 alleging an illegal search. Petitioner argues that Haring requires that he be allowed to bring his action (Pet. at 9). However, petitioner ignores the crucial difference between his case and Haring. In the case at bar, there is a long accepted common law defense, the conviction bar. In contrast, in Haring the Court was being asked to carve out a new defense, not available at common law, for section 1983 lawsuits. As this Court has stated:

> [O]ur role is to interpret the intent of Congress in enacting §1983, not to make a free-wheeling policy choice, and ... we are guided in interpreting Congress's intent by the common-law tradition.

Malley v. Briggs, supra, 106 S. Ct. at 1097. The Fifth Circuit drew this distinction when it noted that this Court in Haring had not been "squarely faced with, and expressly rejected for section 1983 suits, a common law rule preventing an action for illegal search ...." Brown v. Edwards, 721 F.2d 1442, 1449 n.8 (5th Cir. 1984).

The only other Circuit to address the issue squarely adopted the conviction bar for section 1983 false arrest actions. McClam v. Barry, supra, 697 F.2d at 370-71. The Court relied especially on the virtual identity of the common law and civil rights causes of action for false arrest. McClam v. Barry, supra, 697 F.2d at 370-71.

No other Circuit has directly confronted the issue. Decisions in the Fifth Circuit point in both directions. Compare Martin v. Delcambre, 578 F.2d 1164 (1978) (apparently applying conviction bar); Covington v. Cole,

528 F.2d 1365 (1976) (same); Shank v. Spruill, 406 F.2d 756 (1969) (same) with Greer v. Turner, 603 F.2d 521 (1979) (apparently rejecting conviction bar); Brown v. Edwards, supra, 721 F.2d at 1449 n.8 (same). Other Circuits have suggested, in dicta, that the conviction bar should be excluded from a section 1983 action. See Guerro v. Mulhearn, 498 F.2d 1249, 1254-55 (1st Cir. 1974); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Cf. Jackson v. Official Representatives of the L.A.P.D., 487 F.2d 885, 886 (9th Cir. 1973) (issue raised only in traditional collateral estoppel terms).

However, those decisions do not follow the approach laid down by this Court for deciding whether a defense is excluded from section 1983. See, e.g., Malley v. Briggs, supra, 106 S. Ct. at 1095. Further, those decisions do not discuss the reasons relied on by the Second and District of Columbia

Circuits for application of the conviction bar to a 1983 action.

The Second and District of Columbia Circuits are thus the only courts to rule on this precise issue. Both Circuits applied the common law conviction bar to the cognate section 1983 action and held that a conviction is "conclusive evidence of the good faith and reasonableness of the officer's belief in the lawfulness of the arrest" (18a).[2]

Thus, there is no need to review this case. The Second Circuit decision followed

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[2]Under New York law a criminal conviction precludes subsequent civil litigation over probable cause to arrest. Broughton v. State, 37 N.Y.2d 451, 458, cert. denied sub nom Schanbarger v. Kellogg, 423 U.S. 929 (1975). The Court below did not reach the question of whether 28 U.S.C. §1738 requires application of this preclusive rule (13a). See Allen v. McCurry, 449 U.S. 90, 96 (1980). See also Haring v. Prosise, 462 U.S. 306, 314 (1983) (determination of the preclusive effect of a prior conviction under state law is the "threshold question" in a 1983 action).

this Court's precedent in the area and the decision is not in conflict with the holdings of any other circuit.

II. THE ISSUE RAISED BY THE PETITION NEED NOT BE REACHED BECAUSE ON THIS RECORD THE RESPONDENTS HAD A LEGALLY SUFFICIENT BASIS TO DETAIN PETITIONER.

This is not a case, as petitioner suggests, where an arrested person was illegally detained for days on a hunch (Pet. at 8). The respondent police officers had a legally sufficient basis to detain petitioner for initial questioning and for further investigation.[3]

The officers stopped petitioner while he drove in New York City in a car with Illinois license plates, because he made an illegal

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[3]The Court below noted, but did not address, the question whether respondents had probable cause to arrest petitioner (20a).

right turn, parked illegally at a bus stop, and because his car had a broken window, which suggested it had been stolen (3a-4a). This was a legally sufficient basis for the initial stop. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968).

When questioned, petitioner produced a Virginia driver's license in the name Sammy Davis, Jr. and a carbon copy of a Hertz rental agreement, which provided that the car would be returned ten days earlier, made out to Jenne Currie (3a-4a). Petitioner said Currie was his aunt (4a). The name Sammy Davis Jr. had been handwritten onto the rental agreement as an additional driver in original ink (4a). Another ink notation said an accident report had been filed (4a).

Respondents received no response to the radioed inquiry into whether the car had been stolen (4a). At that point, the information provided by petitioner

constituted a legally sufficient basis for detaining[4] petitioner until respondents could telephone Hertz. See United States v. Sharpe, 470 U.S. 675 (1985); United States v. OLregon, 748 F.2d 1371, 1376 (10th Cir. 1984). The detention was required because respondents needed to telephone Hertz to check the status of the car. Thus, "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." U.S. v. Sharpe, supra, 470 U.S. at 686. See also United States v. Place, 462 U.S. 696, 709 (1983).

Given the legally sufficient basis for respondents' detention of petitioner, this

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[4]The record does not disclose whether petitioner went voluntarily to the police station where the phone call to Hertz was made.

Court need not reach the question of whether petitioner could bring a section 1983 action despite his conviction on the charge for which he was arrested.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 3, 1987

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